

the evidence stated earlier that he was driving the car at a fast speed and lost control of it after it had skidded and in the result collided into three other vehicles and ended up facing the way it came. For these reasons, we allow the appeal, set aside the judgment of the Court below and substitute with an Order that the appellant was not liable for the accident.

*Appeal allowed.*

Solicitors: Chooi & Co. ; Gurdip & Co.

# **MOHAMED BIN OTHMAN & ANOR. v. ABDUL SHATTAR BIN ABDUL RAHIM & ORS.**

[S.C. (Salleh Abas L.P., Syed Agil Barakbah & Wan Hamzah S.C.J.) May 14, 15, November 10 & December 13, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 343 of 1985]

*Company Law – Sale of shares in a private company – Application for specific performance – Whether there was a valid contract – Whether there was notice of transfer of shares – Whether Secretary had authority to offer shares for sale – Summary judgment – Appeal – Leave to file cross-appeal – R.H.C. 1980, O. 81 – Rules of the Supreme Court, 1980, r. 52(3).*

*Practice and Procedure – Specific performance – Summary judgment – Appeal – Leave to file cross-appeal – R.H.C. 1980, O. 81 – Rules of Supreme Court, 1980, r. 52(3).*

The appellants and the respondents were shareholders in a private company. The former owned 32% of the shares and the latter had a total of 51% of the shares. The respondents authorised the first respondent to negotiate the sale of all their shares in the company to the highest bidder. The first respondent in turn authorised the secretary of the company to make offers to the existing shareholders to purchase all the said shares. The secretary accordingly sent out letters of offer. The appellants received the letter from the secretary to the effect that the respondents had decided to sell their 51% shares at \$17/- per share. The appellants accepted the offer to purchase all the said shares and informed the secretary by letter. The secretary communicated this to the respondents but the respondents subsequently refused to effect the sale of the shares. The appellants filed a writ claiming specific performance, damages for breach of contract, injunction and other reliefs.

The three issues to be considered in this case were

- A (1) whether there was a valid and enforceable contract between the parties for the purchase of the respondents' 51% shares;
- (2) whether there was a notice of transfer of the shares as required under Article 34 of the Company's Articles of Association,
- B (3) whether the secretary was acting on his own or in the name of the company in offering the said shares for sale.

The learned trial judge heard the application in chambers and allowed it but subsequently after hearing in open court, he dismissed it. The learned trial judge held that the letter written by the first respondent to the secretary of the company was a transfer notice as required by Article 24(b) of the Company's Articles of Association and with that notice the company became his agent for the sale of the shares. The learned trial judge however held that the secretary had no power to act for the company in respect of the sale of the respondents' shares on the ground that he had no authority to write the letters of offer to the appellants and the letter to the first respondent and in doing so he was acting *ultra vires* the Articles of Association. The learned trial judge therefore held that there was no valid and enforceable contract for the sale of the shares and he dismissed the plaintiffs-appellants' application. The applicants appealed.

- E Held, by a majority (Wan Hamzah S.C.J. dissenting):  
(1) the learned trial judge was correct in holding that the letter written by the first respondent to the secretary of the company was a transfer notice as required by Article 34(b) of the Company's Articles of Association;

- (2) in this case according to the relevant records the secretary was acting on the orders of the company with full authority based on the resolution of the Board of Directors. In furtherance of the authority given, the offer of sale was sent out to the shareholders including the appellants by the secretary in his capacity as the secretary of the company and not on his own behalf. In other words he was acting on behalf of the company and what he did was to carry out the decision of the Board;

- G (3) the letter of offer was accepted by the appellants to buy the said shares. A contract was therefore formed;

- (4) there were no other triable issues and the evidence before the learned Judge was sufficient for him to come to a decision. The appeal should be allowed and an order for specific performance made;

- H (5) since it was the fault of the respondents the appellants are not bound to pay interest and for the same reason the appellants are entitled to the profits earned by the company.

[Editorial Note: Wan Hamzah S.C.J. in his dissenting judgment said that in his opinion all the issues in the case have to be tried before it can be finally determined whether the appellants are entitled to specific performance. Many of the issues cannot be disposed of fairly merely on affidavit evidence. In order that justice be done the parties should be given a chance to call witnesses if they wish and to examine or cross-examine the deponents of the affidavits and the writers of the documents produced. He therefore held that the defendants-respondents should have unconditional leave to defend].

## SUPREME COURT.

*R. D. Rajasingam* for the appellants.

*Raja Abdul Aziz Addruse* (*P.S. Gill* with him) for the respondents.

*Cur. Adv. Vult.*

Syed Agil Barakbah S.C.J. (delivering the majority Judgment of Salleh Abas L.P. and himself): This was an appeal against the decision of the learned Judge of the High Court, Kuala Lumpur, dismissing the appellants'/plaintiffs' application under Order 81 of the Rules of the High Court for specific performance of a contract for the sale of shares of a company known as Forex Enterprise Sdn. Bhd., incorporated in the States of Malaya and having its registered office at 2nd floor, Ming Building, Jalan Bukit Nanas, Kuala Lumpur ("the company"). Earlier the learned Judge heard the application in chambers and allowed it but subsequently after hearing in open Court, he dismissed it with costs.

The respondents also filed a cross-appeal but a preliminary objection was raised on the ground that it was served on the appellants out of time. The objection was dismissed since in our view there were reasonable grounds for exercising our discretion to grant them leave under rule 52(3) Supreme Court Rules, 1980. The cross-appeal was allowed to stand.

Briefly the uncontroverted facts were that the appellants and the respondents were shareholders of the company. The former owned 32% of the shares and the latter had a total of 51% of the shares. The respondents authorised the first respondent to negotiate the sale of all their shares in the company to the highest bidder. The first respondent in turn authorised the secretary of the Company to make offers to the existing shareholders to purchase all the said shares. The secretary accordingly sent out letters of offer. The appellants received a letter dated October 30, 1981, from the secretary to the effect that the respondents had decided to sell their 51% shares at \$17/- per share. The appellants accepted the offer to purchase all the said shares by letters dated November 18 and 19, 1981, sent to the secretary who in turn communicated it to the respondents. The latter subsequently refused to effect the sale of their 51% shares. After protracted negotiations the appellants filed a writ claiming against the respondents for specific performance of the agreements reached

A between the parties, for damages of breach of contract in addition or in lieu of the above, injunction, further and other reliefs and costs. The respondents had filed their statement of defence.

Before us, there were three issues to be considered, viz:

- B (1) Whether there was a valid and enforceable contract between the parties for the purchase of the respondents' 51% shares;
- C (2) Whether there was notice of transfer of the shares as required under Article 34 of the Company's Articles of Association; and
- (3) Whether the secretary was acting on his own or in the name of the Company in offering the said shares for sale.

D

All the three issues are inter-related and the answer to the first depended on the answers to the other two issues.

The learned Judge in dealing with the second issue held that the letter dated October 28, 1981, written by the first respondent to the secretary of the Company was a transfer notice as required by Article 34(b) of the Company's Articles of Association and with that notice the Company became his agent for the sale of the shares. With respect, we agree with the learned Judge.

F

Article 34 is a restrictive clause which is intended to prevent shares of the Company from going outside the hands of existing members. It allows a member to transfer his shares to another member but disallows any such transfer to a non-member unless it is first offered to all the other members. Under paragraph (b) which is material to the present appeal, the proposing transferor is required to give notice in writing to the Company of his intention to transfer. The transfer notice is required to specify the sum he fixes as the fair value of his shares and shall constitute the Company his agent for the sale of the shares to any member of the Company willing to purchase them at the price fixed. A transfer notice may include several shares and shall not be revocable except with the sanction of the Board. Under paragraph (c), the Company is required within fifty-six days after being served with the transfer notice to find a purchasing member. The Company shall give notice to the proposing transferor who shall be bound to transfer the shares to the purchasing member, upon payment of the fair value as fixed in paragraphs (b)

and (d). It is clear therefore that the letter of October 28, 1981, sent out by the first respondent for and on behalf of all the four respondents was a notice of transfer as required under Article 34 which came into play thereby making the Company to be their agent. The letter states:

"ABDUL SHATTAR BIN ABDUL RAHIM

October 28, 1981.

The Secretary,  
Forex Enterprise Sdn Berhad,  
Bangunan Ming,  
Jalan Bukit Nanas,  
KUALA LUMPUR.

Dear Sir,

FOREX ENTERPRISE SDN BHD

In connection with the sales of 51% of shares in the above stated company, the offer I have received so far is \$17.00 (Ringgit Seventeen only) per \$1.00 (Ringgit One only).

Please inform the remaining shareholders of this offer.

Thank you.

Yours sincerely,

Sgd."

On the third issue, the learned Judge held that the secretary had no power to act for the Company in respect of the sale of the respondents' shares on the ground *inter alia* that he had no authority to write the two letters of offer dated October 30, 1981, to the two appellants and the letter dated November 21, 1981, to the first respondent and in doing so he was acting *ultra vires* the Articles of Association. With respect, we do not agree because the learned Judge erred in arriving at such conclusion. He merely referred to Article 116 of the Articles of Association which gives the Board powers to delegate its powers to committees consisting only of the members of the Board. His attention was not drawn to the provision of Article 94 which provides *inter alia* powers to the Board to appoint persons to be members of the committee, or managers or agents and to delegate to any such persons any of the powers, authorities and discretions vested in the Board with power to sub-delegate. The Board is also empowered to appoint a secretary under Article 122.

Section 139 of the Companies Act 1965 contains provision for the appointment of one or more secretaries in a company incorporated pursuant to the Act. The secretary of a company is its admini-

strative officer and his function is to give effect to the decisions of the Board of Directors by drafting and signing contracts and other administrative matters. He has no power to make commercial decisions on the Company's behalf and he acts outside his authority if he borrows money in the Company's name or negotiates contracts on its behalf. He may, however, negotiate contracts necessary for carrying on the administration of the Company's organisation, such as contracts for appointment of staff *etc.* Of course, the articles of association may empower the directors to delegate any of their powers to any agent they choose and it is not uncommon for them to delegate to the secretary especially when the secretary is also a director (*Pennington Company Law* 4th Edition (1979)). The secretary can also act as agent for the company to do such things as are delegated to him or are normally performed by the secretary (*Topham & Ivamy's Company Law* 15th Edition (1974)). He must obey the orders of the directors and give effect to their resolutions by issuing notices, sending circulars, writing letters *etc.* He will also prepare the agenda for directors' meetings and general meetings of the Company and normally writes up the minutes, either from his own notes or from those of the chairman (*Gore Brown on Companies* 43rd Edition para 26-9).

On perusal of the relevant records, we are satisfied that the secretary in the instant case was acting on the orders of the company with full authority based on the resolution of the meeting of the Board of Directors on October 20, 1981, in which the first respondent himself was the chairman. (See pages 193/194, 2nd volume of the appeal record). The chairman briefed the meeting that he had been given a mandate by three of the shareholders to sell their shares for more than \$10/- per share. He had scouted around and succeeded in finding an interested party to purchase the shares at \$17/- each. He then asked the secretary to give an opinion of how to go about Article 34 of the Articles of Association. After hearing the secretary's view, the chairman agreed to hand over within the next two days the relevant letters pertaining to the offer and the authority from the other shareholders including a covering letter from the first respondent for sale of his own shares and indicating clearly the amount of \$17/- as the selling price per share covering the sale of the whole of 51,000 shares. The meeting also authorised the secretary to circulate to the other members as soon as practicable the offer for sale of the said shares within the following terms of reference:

- (a) The period for accepting the offer being 30 days from the date of the letter; and
- (b) suitable arrangements to be made immediately thereafter for settlement *etc.* in the event of acceptance.

In furtherance of the authority given, the offer for sale was sent out to the shareholders including the appellants by the secretary in his capacity as the secretary of the company and not on his own behalf. (See pages 189/190, 2nd volume of the appeal record). In other words, he was acting on behalf of the company and what he did was to convey the decision of the Board. The letter of offer was accepted by the appellants to buy the said shares. In our view, a contract was formed. The answer to the first question is therefore in the positive.

We do not think there are other triable issues and are satisfied that the evidence before the learned Judge is sufficient for him to come to a decision. We therefore allowed the appeal with costs here and in the court below. We set aside the order of the trial Judge dismissing the application and made an order of specific performance in terms of the application. The deposit should be returned to the appellants. We also dismissed the cross-appeal with costs.

Subsequently on November 10, 1986, we heard further submissions from counsel on the question of interest payable on the purchase price and the profits earned by the company for period commencing from September 19, 1981 (the date on which the contract ought to have been performed but not performed), to the date of the actual performance. In view of the fact that it was the respondents who refused performance of the contract these two questions must be decided on the basis of fault.

In our view, since it was the fault of the respondents, the appellants are not bound to pay interest and for the same reason the appellants are entitled to the profits earned by the company.

**Wan Hamzah S.C.J. (dissenting):** Both plaintiffs and all of the defendants are, and were at the material times, shareholders in Forex Enterprise Sdn. Bhd. (herein referred to as the Company). The plaintiffs brought an action in the High Court in which the main prayer is for an order against all the defendants for specific performance of alleged agreements for the sale of all of the defendants'

A shares in the Company to the plaintiffs. In their Statement of Claim the plaintiffs allege that by a written authorisation dated September 1, 1981, the first, second, third and fourth defendants authorised the first defendant to negotiate for the sale of all their shares in the Company to the highest bidder, and that the first defendant authorised one Folk Fong Shing (who was then the secretary of the Company) to make offers of sale of all the shares of the defendants to the other shareholders of the Company, and that the plaintiffs by letters dated October 30, 1981, received such offers from the secretary, for sale at \$17 per share, and accepted the offers. The defendants dispute the plaintiffs' claim and in their Statement of Defence they raise *inter alia* the following issues and contend that —

- D (a) the defendants through the first defendant merely informed the secretary of the price of \$17 *per* share as the price which was being bid, but did not offer \$17 *per* share as the price for the proposed sale;
- E (b) in terms of the letters dated 1.9.1981 and 28.10.1981 the Defendants invited the shareholders to offer their highest bid and the said letters amount to no more than an invitation to treat;
- F (c) Folk Fong Shing had no authority and was not authorised to issue the alleged letters dated 30.10.1981 offering \$17 *per* share;
- (d) Folk Fong Shing failed to extend to the first defendant copies of the alleged letters dated 30.10.1981 until after 23.11.1981.

G The plaintiffs filed summons-in-chambers under Order 81 of the Rules of the High Court asking for the grant of the order of specific performance on the ground that the defendants have no defence to the action. A number of affidavits were filed in support of the application including one deposed to by Folk Fong Shing. A number of affidavits were used by the defendants to oppose the application. In the affidavits more issues are raised, among which are the following:

- I (i) The plaintiffs contend that the first defendant's offer to sell at \$17 *per* share was recorded in the minutes of the Board of Directors meeting on 20.10.1981 attended by the first defendant as the chairman and by the second defendant as a director. The defendants contend that the minutes were draft minutes wrongly recorded

and not confirmed at subsequent meetings of A  
the Board.

- (ii) The defendants contend that on or about 28.10.1981 the first defendant merely forwarded to Folk Fong Shing a copy of the defendants' letter of 1.9.1981 authorising the first defendant to negotiate, together with the first defendant's letter dated 28.10.1981 requesting Folk Fong Shing to inform the other shareholders that thus far he had received offers of up to \$17 *per share*.
- (iii) The defendants contend that on 23.11.1981 the first defendant rang up Folk Fong Shing in the morning and informed him that he had received a bid of \$27 *per share* and requested him to inform the shareholders, and Folk Fong Shing replied that it was too late for him to do so as he had sent out the letters of offer of \$17 *per share*, but he never mentioned that the alleged offers had been accepted. The first defendant immediately told him that he (Folk Fong Shing) had no authority to make offers of sale of the defendants' shares but he was merely required to call for bids.
- (iv) The defendants allege that immediately after the telephone conversation on 23.11.1981 first defendant wrote a further letter dated 23.11.1981 to Folk Fong Shing stating that he had just received an offer to purchase at \$27 *per share*, and he personally delivered the letter to Folk Fong Shing and again confronted him as to why he had made the offer and why no copies of his alleged offer letters had been sent to the first defendant. Folk Fong Shing still did not mention that the alleged offers had been accepted.
- (v) The defendants contend that it was after first defendant had sent his letter dated 23.11.1981 that he received Folk Fong Shing's letter dated 21.11.1981 informing of the acceptance of the offers sent out by him.
- (vi) The defendants contend that no transfer notice had been given as required under Article 34(b) of the Memorandum and Articles of Association.
- (vii) The defendants contend that the alleged acceptance by the plaintiffs of the alleged offers is not binding on the defendants as it was done in collusion with Folk Fong Shing against whom the defendants had issued a Third Party Notice

by which the defendants claim against him to be indemnified against the plaintiffs' claim and for damages for wrongful misrepresentation or breach of professional duty or for professional negligence in issuing letters of offer of sale without authority and without transfer notice by the defendants.

After hearing further arguments in Open Court the learned Judge dismissed the plaintiffs' summons. In his Judgment he considered only two of the issues listed above, *i.e.* issues (c) and (vi). On issue (vi) he made a finding that the letter dated October 28, 1981, constitutes a transfer notice under Article 34(b). On issue (c) he held that Folk Fong Shing had no authority to write the letters of offer dated October 30, 1981, to the plaintiffs. He so held for the reasons which he stated in the Judgment. It appears that because he decided to dismiss the summons on issue (c) he felt that it was not necessary for him to consider and decide on the other issues. In my opinion all issues in this case have to be tried before it can finally be determined whether the plaintiffs are entitled to an order of specific performance. In my judgment many of the issues cannot be disposed of fairly merely on affidavit evidence. In order that justice be done the parties should be given a chance to call witnesses if they wish and to examine or cross-examine the deponents of the affidavits and the writers of the various documents produced.

I note that a few points in favour of the defendants' case emerge from some of the documents produced to the Court. In his letter dated October 28, 1981, sent to Folk Fong Shing the first defendant merely stated that the offer which he had received so far was \$17, and he did not state that he was making an offer of \$17 *per share*. When Folk Fong Shing's accountant firm wrote the letter dated November 21, 1981, to the first defendant, it referred to "your letter of offer dated October 28, 1981" and did not refer to offer allegedly made at the meeting of the Board of Directors. To treat first defendant's letter of October 28, 1981, as a letter of offer seems to be incorrect as that letter does not contain an offer. There was a possibility that there was no offer made at the Board of Directors meeting and that Folk Fong Shing made the offers to the plaintiffs on the mistaken belief that the first defendant's letter of October 28, 1981, was a letter of offer. However, all these are not conclusive and as I have already indicated the issues should be tried and the parties should be given a chance to prove their case at the trial.

In my judgment the appeal should be dismissed and the defendants should have unconditional leave to defend.

*Appeal allowed.*

Solicitors: *Lewis & Co. & Gill & Tang.*

### ABDUL RAHIM v. VALLAPAI SHAIK

[S.C. (Seah, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) September 25, 1986 & April 28, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 235 of 1986]

*Land Law – Caveat – Conditional agreement to purchase land – Conditions not fulfilled – Land subsequently resold – Whether original purchaser has right to lodge caveat – Application to remove caveat – Whether there is interest in property and serious questions to be tried – Balance of convenience – National Land Code, s. 327.*

In this case one K. Abdul Rahim (deceased) was the owner of a piece of land in Kuala Lumpur. He left him surviving 3 sons and 4 daughters as beneficiaries. In 1977 the three sons of the deceased entered into an agreement with one Tajuddin for the sale of the property, subject to their obtaining the consents of the female beneficiaries. It was agreed that the said Tajuddin should pay \$5,000 towards the purchase price and the balance of the purchase price (\$295,000) to be settled by monthly payments of \$5,000 to the United Asian Bank towards the discharge of the charge against the land. The said Tajuddin paid the initial \$5,000 and also paid one instalment of \$5,000 to the said bank but thereafter defaulted in all the monthly instalments. The female beneficiaries refused to give their consents. Subsequently the appellant (the attorney for 4 of the beneficiaries) obtained letters of administration to the estate of K. Abdul Rahim (deceased) and entered into an agreement for the sale of the land to one Soo Seng Co. Sdn. Bhd. for an agreed purchase price of \$1.5 million. The respondent who was the attorney of Tajuddin thereupon lodged a private caveat on the said land to protect his principal's interest. Subsequently the appellant obtained a court order for the sale of the land. The appellant applied for the removal of the caveat. The learned trial judge dismissed the application and the appellant appealed.

Held, allowing the appeal: the 1977 agreement was a conditional agreement but none of the conditions have been fulfilled. The court order of sale was a consent order involving the appellant and the six beneficiaries of the estate including the female beneficiaries who had earlier refused their consents to the 1977 agreement.

*Case referred to:*

- (1) *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 M.L.J. 212.

### A SUPREME COURT.

*C.V. Das* (T. Kuhanandan with him) for the appellant.

*M.S. Murthi* for the respondent.

### B

*Cur. Adv. Vult.*

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): The application in the High Court was under section 327 of the National Land Code 1965 where by Originating Summons dated April 18, 1985, the appellant applied for the removal of Private Caveat Presentation No.2383/84 Jilid 25 Folio 61 on land held under Certificate of Title No. 14860 for Lot No. 75 Section 6, Town of Kuala Lumpur. On May 26, 1986, the learned judge dismissed the application with costs. The learned judge was apparently of the opinion that since a number of issues had been raised relating to the rights and interests of the different parties to the property it would only be right and proper that the caveat should be allowed to remain until the determination of such rights and interests. We disagreed and allowed the appeal. We now state our reasons.

It is necessary to revert briefly to the history of the case. One K. Abdul Rahim @ Abdul Rahim s/o Kadar Batcha died intestate in India on March 25, 1977, leaving behind 3 sons and 4 daughters as beneficiaries who were also resident in India. He left, however, a piece of property situated in this country in the form of the land referred to in the Originating Summons. On September 5, 1977, the three sons of the deceased and another (who claimed to be a beneficiary) entered into a sale and purchase agreement with one Tajuddin s/o Md. Kassim as purchaser whereby they agreed to sell not only their six-tenths interests as beneficiaries in the property but also the remaining four-tenths interests of the female beneficiaries subject however to their obtaining the consents of all the female beneficiaries. It was agreed in the agreement that the said Tajuddin s/o Md. Kassim was to pay \$5,000 to the vendors towards the purchase price and the balance of the purchase money (\$295,000) to be settled by monthly instalments of \$5,000 to the United Asian Bank towards the discharge of the charge against the land. The said Tajuddin s/o Md. Kassim paid the initial \$5,000 and also paid one instalment of \$5,000 to the said bank but thereafter defaulted in all the monthly instalments. The female beneficiaries refused to give their consents. Nothing happened for a few years until